

NO. 34719-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DENNIS GASTON,

Appellant.

FILED
FEB 27, 2017
Court of Appeals
Division III
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KLICKITAT COUNTY

The Honorable Brian Altman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Two of appellant's community custody conditions are unauthorized and/or unconstitutional.

Issues Pertaining to Assignment of Error

1. Is appellant's community custody condition prohibiting him from purchasing, possessing, or reviewing pornography unlawful where it is not "crime related" and unconstitutionally vague?

2. Is appellant's community custody condition prohibiting him from frequenting places where children congregate, including playgrounds, parks, and schools unconstitutionally vague?

B. STATEMENT OF THE CASE

In August 2013, the Klickitat County Prosecutor's Office charged Dennis Gaston with one count of child molestation in the second degree, alleging he had sexual contact with 13-year-old J.W. CP 1-6. A jury convicted Gaston. CP 7. The Honorable Brian Altman sentenced him to 18 months' confinement and 36 months' community custody. CP 9. The conviction was reversed on appeal, however, based on the trial court's failure to conduct a complete analysis under ER 404(b) before admitting evidence Gaston had previously struggled with "urges," which jurors could have interpreted

as urges to have sexual contact with minors. State v. Gaston, 192 Wn. App. 1032, 2016 WL 398317, at *6-*11 (2016). Because of J.W.'s inconsistent statements and testimony regarding the alleged molestation, this Court found the error prejudicial and ordered a new trial. Id. at *11.

On remand, Judge Altman conducted a more thorough analysis under ER 404(b) and again found the "urges" evidence admissible. RP 17-21; CP 97-99. Gaston waived his right to trial by jury. CP 96. J.W. testified that in April 2013, when J.W. was 13 years old, Gaston – a family friend who attended high school with J.W.'s father – stuck his hands down the front of J.W.'s pants and fondled his penis after J.W. had stopped by Gaston's garage to admire Gaston's progress restoring an antique car previously owned by J.W.'s father. RP 46-69. And J.W. was once again confronted with inconsistencies in his story, the details of which often changed depending on when and to whom he was speaking, and his delayed reporting of the event. RP 63-66, 70-83.

Despite these inconsistencies, Judge Altman found J.W. credible and found Gaston guilty of molestation. RP 134-139; CP 100. At sentencing, Judge Altman again imposed an 18-month

prison sentence and 36 months' community custody, CP 103, including the following prohibitions:

- "Do not purchase, possess or view any pornographic material."
- "No frequent playgrounds, parks, schools, or any locations where children are known to congregate."

CP 110. Gaston timely filed his Notice of Appeal. CP 113-125.

C. ARGUMENT

TWO COMMUNITY CUSTODY CONDITIONS ARE UNAUTHORIZED AND/OR UNCONSTITUTIONAL

An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Appellate courts routinely consider pre-enforcement challenges to sentencing conditions. State v. Sanchez Valencia, 169 Wn.2d 782, 786-790, 239 P.3d 1059 (2010). Constitutional vagueness challenges are ripe for review "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." Id. at 786 (quoting Bahl, 164 Wn.2d at 751).

1. Prohibition On "Pornographic Material."

a. *Not authorized by statute*

Under RCW 9.94A.703(3)(f), the trial court may require an offender to "[c]omply with any crime-related prohibitions." The

prohibition on purchasing, possessing, or viewing pornography does not qualify as a crime-related prohibition in this case and therefore must be stricken. There was no evidence presented that possessing or perusing pornography played any role in Gaston's crime.

In State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870, review denied, 181 Wn.2d 1019, 337 P.3d 325 (2014), Division One accepted the State's concession that a condition ordering the defendant to refrain from possessing sexually explicit material "must be stricken because no evidence suggested that such materials were related to or contributed to his crime" of child molestation. The same holds true here. Because the prohibition on pornography is not in any way related to the crime at issue, the trial court's imposition of this prohibition exceeded its authority. The condition should accordingly be stricken.

b. Unconstitutionally vague

The prohibition on pornography suffers from a second problem – it is unconstitutionally vague.¹ Under the due process clauses of the Fourteenth Amendment and article I, section 3, the State must provide citizens fair warning of prohibited conduct. Bahl, 164 Wn.2d

¹ A pre-enforcement vagueness challenge to a sentencing condition banning possession or access to pornography is ripe for review. Bahl, 164 Wn.2d at 745-752.

at 752. This due process vagueness doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is unconstitutionally vague if it (1) does not define the prohibition with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. If it fails either prong, the prohibition is unconstitutionally vague. Id. at 753.

There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. Imposition of unconstitutionally vague conditions is manifestly unreasonable, requiring reversal. Id. at 791-92.

In Bahl, the defendant challenged a sentence condition prohibiting him from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer.” Bahl, 164 Wn.2d at 754. As the Bahl court discussed at length, the word “pornography” is entirely subjective, and a prohibition on possessing or perusing pornography is unconstitutionally vague. 164 Wn.2d at 754-58. Because definitions of pornography can and do differ widely – they may “include any nude depiction, whether a

picture from *Playboy Magazine* or a photograph of Michelangelo's sculpture of David," Bahl, 164 Wn.2d at 756 – the prohibition on purchasing, possessing, or viewing pornography is not sufficiently definite to apprise ordinary persons of what is permitted and what is proscribed. Because the condition is unconstitutionally vague, it must be stricken from Gaston's judgment and sentence. See id. at 758, 761-762.

Notably, the State conceded this condition was unconstitutional during Gaston's first appeal. This Court chose not to address the issue, however, since it was reversing Gaston's conviction. See State v. Gaston, at *17. Nothing has changed. The condition remains unconstitutionally vague.

2. "Do Not Frequent Places Where Children Congregate"

Judge Altman also ordered, as a condition of Gaston's community custody: "No frequent playgrounds, parks, schools, or any locations where children are known to congregate." CP 110.

Recently, in State v. Irwin, 191 Wn. App. 644, 652, 364 P.3d 830 (2015), Division One considered a condition like the one at issue here, which read, "Do not frequent areas where minor children are

known to congregate, as defined by the supervising CCO.”² Division One struck this condition as unconstitutionally vague and remanded for resentencing. Id. at 655. The Irwin court explained, “Without some clarifying language or an illustrative list of prohibited locations . . . the condition does not give ordinary people sufficient notice to ‘understand what conduct is proscribed.’” Id. (quoting Bahl, 164 Wn.2d at 753). The court acknowledged that it “may be true that, once the CCO sets locations where ‘children are known to congregate’ for Irwin, Irwin will have sufficient notice of what conduct is proscribed.” Id. But this is not sufficient because it would still “leave the condition vulnerable to arbitrary enforcement,” thereby failing the second prong of the vagueness analysis. Id.

In State v. Riles, the Washington Supreme Court upheld the constitutionality of a community custody condition similar to the one at issue in Irwin and at issue here. 135 Wn.2d 326, 349, 957 P.2d 655 (1998), abrogated by Sanchez Valencia, 169 Wn.2d 782. However, the Riles court’s analysis presumed the condition was constitutional, a presumption the Sanchez Valencia court later expressly repudiated. 169 Wn.2d at 792-93.

² The Irwin court found this pre-enforcement challenge ripe for review. Id. at 650-652.

Thus, the Irwin court concluded Riles did not control and instead relied primarily on the Washington Supreme Court's more recent decision in Bahl. Irwin, 191 Wn. App. at 655. As previously addressed, the Bahl court held a condition unconstitutionally vague where it prohibited Bahl from possessing or accessing pornographic material. Bahl, 164 Wn.2d at 743. Moreover, as the Bahl court recognized, "The fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Id. at 758.

As in Bahl and Irwin, the condition prohibiting Gaston from going places where children congregate fails to provide sufficient definiteness. Some locations identified in the condition are more or less obvious – playgrounds, for example. But other locations are not so obvious. A park designed and intended for child's play is likely off limits. But Rainier National Park also is technically a "park," and it is unclear if Gaston is prohibited from going to this or any other national, state, or city park. Children can be found at any of these locations. Similarly, an elementary school is likely off limits. But the University of Washington also is a "school," and it is unclear if Gaston is

prohibited from going to this or any other college campus.³ These prohibitions are not sufficiently definite to distinguish between what is prohibited and what is allowed. Children congregate almost everywhere, and Gaston has no way of knowing his boundaries despite the court's attempt to provide some examples. Because no ordinary person would know what conduct is prohibited, the condition fails the first prong of the vagueness test.

“In addition, when a statute or other legal standard, such as a condition of community placement, concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms.” Bahl, 164 Wn.2d at 753 (citing Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). Vagueness concerns “are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded of criminal statutes because their consequences are more severe.” Id. (quoting United States v. Williams, 444 F.3d 1286, 1306 (11th Cir. 2006), rev'd

³ The indefiniteness of prohibitions on going to “schools” was fully recognized by our Supreme Court in State v. McCormick, 166 Wn.2d 689, 692-96, 213 P.3d 32 (2009), in which McCormick was held in violation of a similar condition when he went to a food bank that, unbeknownst to him, happened to be in the same building as a public school.

on other grounds, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)).

The condition prohibiting Gaston from going where children congregate implicates the First Amendment. Indeed, the condition might very well subject him to exclusion from most if not all houses of worship given children's likely presence there. Because the condition has the very real effect of precluding Gaston's free exercise of religion and assembly, to be valid it must meet a more definite, clearer standard. The vague condition, as currently written, cannot satisfy the first prong of Bahl's vagueness analysis. This court should strike the condition.

The condition also fails the vagueness test's second prong. Both Bahl and Sanchez Valencia involved delegation to a community corrections officer to define the parameters of a condition. Sanchez Valencia, 169 Wn.2d at 794; Bahl, 164 Wn.2d at 758. The Sanchez Valencia court determined that where a condition leaves so much discretion to an individual corrections officer, it suffers from unconstitutional vagueness. 169 Wn.2d at 795. Here, as in Sanchez Valencia, the condition does not expressly delegate its parameters to anyone, presumably leaving discretion with probation officers. See CP 110; Sanchez Valencia, 169 Wn.2d at 785. In this circumstance,

there are no ascertainable standards of guilt to protect against arbitrary enforcement; nor is there any workable mechanism for obtaining such standards.

The sentencing condition prohibiting Gaston from going to places where children congregate is unconstitutional because it fails to provide reasonable notice as to what conduct is prohibited and exposes Gaston to arbitrary enforcement. This Court should hold that the condition is void for vagueness and strike it from the judgment and sentence.

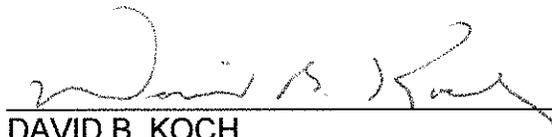
D. CONCLUSION

This Court should strike the offending community custody conditions from Gaston's judgment and sentence.

DATED this 27th day of February, 2017.

Respectfully submitted,

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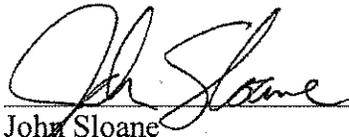
On February 27, 2017, I filed and e-served the brief of appellant directed to:

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Via Email per agreement: paappeals@klickitatcounty.org

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Re Gaston
Cause No., 34719-2-III in the Court of Appeals, Division III, for the state of Washington.

I certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.



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02-27-2017

Date
Done in Seattle, Washington

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